

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

**SOAH Docket No. 582-11-2028**  
**TCEQ DOCKET NO. 2010-1087-PST-E**

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**IN THE MATTER OF  
AN ENFORCEMENT ACTION  
AGAINST EDWARD RATLIFF;**

**RN102057775**

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§

**BEFORE THE  
CHIEF CLERKS OFFICE  
STATE OFFICE OF  
ADMINISTRATIVE HEARINGS**

**EXCEPTIONS TO PROPOSAL FOR DECISION**

Now comes Edward Michael Ratliff, Respondent in the above entitled and numbered cause, files Exceptions to Proposal for Decision and shows:

**I.**

**Jurisdiction, Notice, and Procedural History**

Respondent asserts the State Office of Administrative Hearings (SOAH) failed to establish jurisdiction over the hearing in this proceeding by overruling the timely and properly filed Special Exceptions under Texas Rules of Civil Procedure 90 and 91 to Executive Director's Preliminary Report and Petition Recommending that the Texas Commission on Environmental Quality enter an Enforcement Order assessing an Administrative Penalty against and requiring certain actions of Edward Ratliff (the "EDPRP"). Texas follows the fair-notice standard for pleading, which requires the plaintiff to provide fair and truthful notice of the facts asserted. Texas Rules of Civil Procedure number 13 also requires that the attorney signing the petition certify that the petition is true and correct and factual contentions have evidentiary support. In this action the evidentiary support for the falsity of the TCEQ statements came from the records and testimony of TCEQ staff members. The false statements of facts made by the TCEQ are indisputable; the Court had notice that the TCEQ has made multiple proven false statements of fact previously in this case. In fact the preliminary hearing and procedural schedule was rescheduled because of the false statements of fact by the TCEQ regarding notice of Order No. 3 from the Court that was not received until after the

May 18,2011 deadline to serve discovery upon the TCEQ. The TCEQ made false statements of facts to the Court in an attempt to deny discovery to Respondent.

The Respondent also filed a Plea to the Jurisdiction, which was overruled based on facts submitted by the TCEQ, the same facts which were contained in the Special Exceptions. The appellate court's standard of review for a trial court's ruling on a plea to the Jurisdiction is de novo. *Houston Mun. Employees Pension Sys. V. Ferrell*, 248 S.W.3d 151, 156 (Tex.2007) The Respondent desires to Appeal this Order as provided under Texas Rule of Appellate Procedure 25.

By denying the Respondent fair notice of the facts and overruling the Respondents Special Exceptions the SOAH has denied the Respondents Due Process rights under the United States Constitution and the Texas Constitution.

## II.

### APPLICABLE LAW

#### Waiver

The Supreme Court of Texas established the elements of the affirmative defense of waiver in *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W. 2d 640, 643 (Tex. 1996). The elements are as follows (1) an existing right, benefit, or advantage held by a party; (2) the party's actual knowledge of it's existence; and (3) the party's actual intent to relinquish the right, or intentional conduct inconsistent with the right.

The party asserting an affirmative defense bears the burden of pleading and proving its elements. *Quantum Chemical Corp. v. Toennies*, 47 S.W. 3d 473, 481 (Tex.2001).

1. On or before December 3,2001 the Commission had the right and duty to enforce the regulations conferred upon it by the Texas Legislature. At that time it waived it's enforcement duty in regards to the McMillan's property in writing. It also established a pattern of unequal enforcement of the law by waiving enforcement

of the law in regards to the McMillan property while enforcing the same violation against others with the same violation.

2. The Commission had actual knowledge of the existence of the duty to enforce this specific law and expressly waived it on December 3, 2001.
3. The key element of waiver is intent. *Heinrich v. Wharton County Livestock, Inc.*, 557 S.W.2d 830, 834 (Tex.Civ.App.-Corpus Christi 1977, writ ref'd n.r.e.). In order to establish waiver, the act must be clear and decisive. The Commission intentionally continued this conduct inconsistently with the waived right in 2002, 2003, 2004, 2005, 2006, 2007, 2008 and most of 2009. TCEQ staff testified the Commission never initiated enforcement action on their own initiative after the 2001 memo from the Abilene Section Manager, instead it was only after the Federal Government in 2005 ordered them to act, that several years later inspections began.

The Court cites to the decisions in *Waller* and others for the proposition that the doctrines of limitation, estoppel and laches are inapplicable to government agencies, because violations of statutes may not come to light until some time after the Violative act has occurred, and permitting the government to prosecute violators of these statutes at any time assures the welfare of the citizenry.

What distinguishes these cases from this case is the simple fact the Commission knew of the violations in 2001 and before and expressly relinquished the duty to enforce in 2001 and consistent with that waiver of it's known duty continued a pattern of waiving the right to enforce until after the water tanks were used in a manner exempting them from regulation in 2009. Once the water tanks were used in conformity with Texas Water Code §26.344, the mere passage of time together

with intentional conduct inconsistent with the right, established the last element of waiver as set forth by the Supreme Court of Texas. Once the rules establishing waiver were met, further regulation by the TCEQ was moot.

The Court abused its discretion by failing to apply the Rule of Law as set forth by the Supreme Court of Texas after the Respondent proved with physical and testimonial evidence all three elements required by the Supreme Court of Texas were met.

### **Tex. Water Code § 26.344**

#### **§ 26.344. Exemptions**

(a) An underground or aboveground storage tank is exempt from regulation under this subchapter if the tank is:

- (1) a farm or residential tank with a capacity of 1,100 gallons or less used for storing motor fuel for noncommercial purposes;
- (2) used for storing heating oil for consumptive use on the premises where stored;
- (3) a septic tank;
- (4) a surface impoundment, pit, pond, or lagoon;
- (5) a storm water or waste water collection system;

The Texas Legislature expressly used the word "Exemptions" in the heading of the Tex. Water Code § 26.344 as a word of limitation; they further reinforced this limitation by using the qualifying phrase "storage tank is exempt from regulation" in the body of the law. The Legislature stated in the Code Construction Act, Subchapter B, Construction of Words and Phrases, Govt. §311.011 that (a) Words and phrases shall be read in context and construed according to the rules of grammar and *common usage*. The common meaning found in Blacks Law Dictionary 5<sup>th</sup> Edition defines the word

"exemption" as *"freedom from a general duty or service; immunity from a general burden, tax or charge. Immunity from certain legal obligations. To release, discharge, waive."* The common meaning for "exempt" found in Blacks defines it as follows: *To release, discharge, waive, relieve from liability. To relieve, excuse, or set free from a duty or service imposed upon the general class to which the individual exempted belongs.* By using the words exemption and exempt the Legislature clearly expressed its intention that any rainwater water storage tank is exempt from any regulation by the TECQ or any other regulatory commission. Subchapter C. Construction of Statutes, Govt §311.021 Intention in Enactment of Statutes (1) compliance with the constitutions of this state and the United States is intended; and (2) the entire statute is intended to be effective; (3) a just and reasonable result is intended.

The Texas Water Code § 26.344 is a statute establishing a threshold or bar to jurisdiction by the TCEQ. Lacking statutory jurisdiction, this action is groundless.

The TECQ may exercise only those powers that the Legislature confers upon it in clear and express language, and they cannot erect and exercise what really amounts to a new or additional power for the purpose of administrative expediency. *Pub. Util. Comm'n v. City Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 316, (Tex. 2001); *Pub. Util. Comm'n v. GTE-Southwest, Inc.*, 901 S.W.2d 401, 407 (Tex. 1995); *Centerpoint Energy Entex v R.R. Comm'n*, 2006 Tex. App. LEXIS 5882, 11-13 (Tex. App.-Austin 2006, pet filed).

The Court of Appeals for the Third District of Texas in Austin, Texas explained the difference between interpretive rules and legislative ones in *Sharp v. Cox Tex. Publs.*, 943 S.W. 2d 206, 209 (Tex. App.-Austin 1997, no writ): A rule that "clearly affects individual rights or obligations to the extent it applies is a legislative" as opposed to interpretive" rule." A "legislative" rule has two characteristics. (1) it goes beyond interpretation to promulgate substantive provisions,

and (2) the statute, which delegates to the agency the power to make rules, provides that those rules have authoritative force. The rules found in the Texas Water Code are legislative rules.

Because the TECQ lacks a specific jurisdictional foundation to bring this claim, this action is not consistent with the intent of the drafters and the Court committed error by overruling Respondents Plea to the Jurisdiction.

### **EQUAL APPLICATION OF LAW**

The facts are indisputable; the Commission began a discriminatory pattern of enforcing these laws at least in 2001 and continuing to the present. In 2001 in regards to the same violation in dispute today, the Commission waived enforcement against Mrs. McMillan and as TCEQ staff testified year after year and property owner after property owner they continued to intentionally waive enforcement while at the same time bringing enforcement actions against other violators of the same provision. In fact, of all of the property owners of the same tract involved here, the Commission singled out Respondent while others similarly situated and committing the same acts have not been prosecuted over a span of 10 plus years and 4 years after the Federal Government ordered the TCEQ to act. TCEQ staff members testified that it was TCEQ policy to automatically charge subsequent property owners with the same violations not enforced against previous owners. The evidence of arbitrary and intentional discrimination by the TCEQ in enforcement is clear and comes from the records and testimony of TCEQ's own staff.

### **III.**

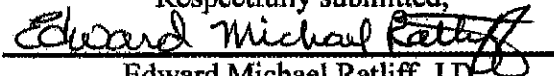
### **NOTICE OF APPEAL**

Respondent hereby states that he desires to Appeal this Order as provided under Texas Rule of Appellate Procedure 25. In *Low v. King*, 867 S.W.2d 141, 142 (Tex. App. Beaumont 1993, orig. proceeding) the Court of Appeals held that when the trial court makes an erroneous ruling on

special exceptions, the aggrieved party has a remedy by appeal. When exceptions are overruled, error regarding the defective pleadings is preserved. *Johnson v. Willis*, 596 S.W.2d 256, 260 (Tex.App.-Waco 1980)

The TCEQ has denied the Respondents Motion for a New Trial, Motion to Modify the Judgment and Request for Specific Finding of Fact and Conclusions of Law before they were filed by inserting line 5 on page 7 of its Proposed Order denying all post-hearing motions. The TCEQ does not control the authority or procedures in the Appellate Courts of Texas. By preemptively denying procedural Motions required to perfect an Appeal the TCEQ is preemptively denying Due Process rights guaranteed by the United States and Texas Constitutions. The 5<sup>th</sup> Circuit held in *Baldwin v. Daniels*, 250 F.3d 943 (2001) that to bring a procedural due process claim under § 1983, a plaintiff must first identify a protected life, liberty or property interest and then prove that governmental action resulted in a deprivation of that interest.

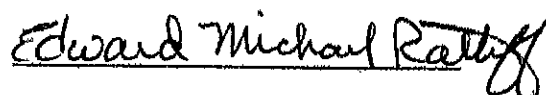
Respectfully submitted,



Edward Michael Ratliff, J.D.  
5145 Upper Montague Road  
Bowie, Texas 76230

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing Motion has been delivered by fax to Mr. Steven M. Fishburn, Staff Attorney for Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, Mr. Blas J. Coy and Mr. Thomas H. Walston on this the 6<sup>th</sup> day of Februray 2012.



Edward Michael Ratliff

512 322 2061 SOAH  
512 239 6377 BJC  
512 239 3434 SF  
512 239 3311 CHIEF CLERK